question, referred to the French law in its totality, including its rules of the conflict of laws, and as the French law would decide the case according to the law of the country to which the testator belonged (*lex patriae*) the New York court should apply New York law. *Held,* that sec. 47 of the Decedent Estate law referred to the French law relating to the lapsing of legacies, and not to the French law in its totality, including the conflict of laws. Referee's report, approved by the Surrogate of New York County. *In the Matter of the Judicial Settlement of the Accounts of Henry Overing Tallmadge, Executor of Coster Chadwick, Deceased* (1919) 62 N. Y. L. J. 215.

See COMMENTS, *supra,* p. 214.

CONTRACTS—BREACH—WAIVER—DAMAGES.—By a contract with the defendant the plaintiff obtained the exclusive selling agency, within a certain territory, of machines which the defendant manufactured. After the plaintiff entered into this business, the defendant forbade his taking orders for machines to be used in "public service," on the ground that another party had the exclusive privilege of such sales. The plaintiff continued the business for a while and then terminated the agency. He sued for the damages which resulted from this limitation of his agency. The defendant contended that the plaintiff had waived this breach of contract and therefore could not recover damages. *Held,* that he could recover, since waiver of a breach does not forfeit a right of action for the resulting damages. *Hoffer v. Hooven-Owens-Rentschiler Co.* (1919, Sup. Ct.) 177 N. Y. Supp. 720.

The distinction between a waiver of excuse for future nonperformance and a forfeiture of a right to damages, both arising from a breach of contract by the other party thereto, is undoubtedly sound. In support of this, see (1918) 28 YALE LAW JOURNAL, 86.

MINES AND MINERALS—INTERFERENCE BY ABANDONED OIL WELL WITH LIVE WELL.—After the plaintiff had sunk a well on his premises which produced oil, the defendant sunk a well on his premises near the plaintiff's well, which proved a non-producer and was abandoned. It caused air to leak into the plaintiff's pump, resulting in loss of suction and a material reduction in the production of oil from the plaintiff's well. The defendant refused to close his well, though he could have done so without trouble or expense by putting back the plug which had been taken out. The plaintiff sued for an injunction and damages. *Held,* that the plaintiff was entitled to relief. *Higgins Oil & Fuel Co. v. Guaranty Oil Co., Ltd.* (1919, La.) 82 So. 206.

See COMMENTS, *supra,* p. 213.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.—The plaintiff's intestate negligently started across the defendant's track and was killed by an engine operated by employees of the defendant. The employees exercised due care and did all they could to avert the accident. The plaintiff sued for damages. *Held,* that she could not recover, with a dictum that where "negligence of the railroad and of the person injured are concurrent and continue up to the moment of the accident," a railroad cannot be held liable under the doctrine of "last clear chance." *Nolan v. Illinois Central R. R.* (1919, La.) 82 So. 590.

The court seems to apply the concept that "last clear chance" means sole physical power in the defendant, after he has actually obtained knowledge of the plaintiff's danger, to avoid the injury. Other authority finds the require-

ment satisfied if the defendant was in a position to have acquired such knowledge by reasonably prudent conduct. *Bond v. Baltimore & O. R. R.* (1918, W. Va.) 96 S. E. 932. For full discussion of the whole doctrine, see COMMENT (1914) 24 YALE LAW JOURNAL, 330.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENCIES—INHERENTLY DANGEROUS ARTICLES.—The defendant manufactured and sold the "King air rifle," which was advertised as harmless. A rifle containing a load of shot, due to the negligence of an employee, was shipped in a consignment from the defendant's plant to a wholesale house for resale. The wholesale dealer, unaware that this rifle was loaded, sold the lot to a retail dealer, who, likewise ignorant, placed it in stock in charge of the plaintiff, a saleswoman in his store. During an examination of this rifle by a prospective customer, it was discharged, seriously injuring the plaintiff who sued for the resulting damages. *Held,* that recovery should be allowed. *Herman v. Markham Air Rifle Co.* (1918, D. Mich.) 258 Fed. 475.

The court justified its holding on three grounds: that the defendant was negligent; that such an intervention by a third party was forseeable under such circumstances; that the rifle was inherently dangerous. The effect of an intervention by a third party upon the originally negligent party's liability is discussed in (1918) 27 YALE LAW JOURNAL, 713, 1087. For a treatment of the liability of a manufacturer for damages resulting from a defective article, see (1918) 27 *ibid.*, 961. See also (1918) 27 *ibid.*, 713; COMMENT (1918) 27 *ibid.*, 1068.

NEGLIGENCE—RIGHTS AND DUTIES OF VEHICLES AND PEDESTRIANS.—The plaintiff's intestate was struck and killed by the defendant's automobile while he was attempting to cross a street diagonally, not at a regular crossing. In an action by his administratrix to recover damages for his death, it was proved that the deceased, before starting across the street, observed the traffic and that there were no vehicles to obstruct either his view or that of the defendant, who was approaching on the same side of the street about one hundred feet away. The defendant claimed that the plaintiff's failure to show that the deceased looked to the right or left after he started to cross the street was fatal to the present claim. *Held,* that such proof was unnecessary, as the plaintiff was "entitled to the presumption that deceased did that which a prudent man would do under the circumstances, and that he continued to do so until the accident took place." *Anderson v. Wood* (1919, Pa.) 107 Atl. 658.

The court remarks in the opinion that, although an automobile may have a "slightly superior right of way between crossings," a pedestrian cannot be held negligent, as a matter of law, when he attempts to cross a street between the regular crossings; on the contrary, if, having observed the traffic and it is so distant that one using due care would deem it safe to cross, he makes such an attempt, it is the duty of an approaching driver not to injure him; and also the pedestrian is under no "fixed duty" to look back although the circumstances may be such that in the exercise of due care it would be his duty to do so. Some of the factors and circumstances to be considered in determining whether a driver has violated his duty to exercise "greater caution in respect to children than in respect to grown up people" are stated in *Di Maio v. Yolen Bottling Works* (1919, Conn.) 107 Atl. 497. The general principle of "reasonable care" applicable to the principal case has also been recently stated by Justice Gager in *Brown v. New Haven Taxicab Co.* (1919) 93 Conn. 251, 254, 255, 105 Atl. 706, 707. *Cf.* also (1918) 28 YALE LAW JOURNAL, 91.